90-322

AUG 20 1990

DOCKET: _____

UNITED STATES SUPREME COURT

OCTOBER, 1990 TERM

DORA VALLANCE, Petitioner

-vs-

JAMES LIONEL BREWBAKER
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE 53RD JUDICIAL CIRCUIT
COURT FOR THE STATE OF MICHIGAN

"PETITION FOR WRIT OF CERTIORARI"

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QUESTION PRESENTED FOR REVIEW

THIS HONORABLE COURT SHOULD GRANT PLAINTIFFS' PETITION, WHERE THE ENFORCEMENT OF SANCTIONS AGAINST PLAINTIFF IS BASED ON HER VIOLATION OF AN ORDER WHICH SHE DID NOT HAVE NOTICE OF, AND THEREFORE CONSTITUTES A VIOLATION OF HER RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

LIST OF PARTIES TO ORIGINAL ACTION

Dora Vallance - Plaintiff

James Brewbaker - Defendant

Stanley Kozial[1] - Defendant

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[1] Plaintiff settled with Kozial and he was susequently dismissed from the case.

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CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The order which plaintiff seeks review of was entered June 9, 1989. The Michigan Supreme Court denied discretionary review on May 30, 1990.

Plaintiff respectfully submits that this Honorable Court has jurisdiction to issue a writ of certiorari as prayed for, pursuant to 28 USC § 1257.

CONCISE STATEMENT OF FACTS & PROCEEDINGS

On April 10th, 1985, during litigation between the parties in Michigan's 53rd Judicial Circuit Court, that court entered an "Emergency Ex-Parte Order Extending Medical Releases," without motion or any other written documentation, and without notice to plaintiff or her attorney. A copy of this secret order is attached as Appendix B. This order attempted to "revive" medical authorizations, which had already expired, signed by plaintiff pursuant to an earlier court order.[2]

Immediately after obtaining this

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[2] This earlier order, entered January 22, 1985, while requiring Plaintiff to sign authorizations, also provided that authorizations would "be valid only until April 8th, 1985, the anticipated date of trial." As required by that order, the expiration date was noted on the face if the medical authorizations.

ex parte order, defense counsel proceeded to Community Memorial Hospital in Cheboygan, Michigan, in order to obtain medical records belonging to plaintiff. The medical records custodian, faced with a court order and an authorization that stated on its face that it had expired two days earlier, refused to produce the records.

Plaintiffs' counsel was contacted and was told that someone was present at the hospital with a release dated April 10, 1985. Plaintiff's counsel, having the benefit of the client's presence in his office, informed the hospital that plaintiff had never signed such a release and that it should be treated as null and void.

Plaintiff first learned abut the ex-parte order that the trial court had entered on the next day of trial, Friday,

April 12, 1985.[3] At that time, Defendants stood up in open court, and accused Plaintiff of having violated the ex-parte order (which plaintiff did not know existed), and requested a dismissal of plaintiff's lawsuit. Despite the facts that the order, when entered, was not served on Plaintiff, and that Plaintiff did not know an order had been entered, the trial court found a "violation" of its order and that the case would be dismissed because "[p]laintiff didn't give a medical release, notwithstanding the Court's Order."

Plaintiff's lawsuit was dismissed and the trial court went on to grant

---

[3] Plaintiff's counsel testified before the trial court regarding the imposition of sanctions and clearly indicated that he did not know about the order at the time Plaintiff asserted her medical privilege. TR 5/5/86 9-10, Appendix G.

defendant's motion for costs and attorney fees under Michigan Court Rule (MCR) 2.313(B), eventually assessing attorney fees totaling over $8,000. A copy of the trial court's Order is attached as Appendix C. Plaintiff paid those sanction moneys into a bond, for the protection of defendant. The trial court released that bond by order dated June 9, 1989, Appendix A.

Plaintiff sought application for leave to appeal this release of bond monies to the Michigan Court of Appeals, which denied plaintiff's application on September 11, 1989, Appendix D. A request for reconsideration was likewise denied, Appendix E on November 8, 1989. The Michigan Supreme Court issued its order denying leave to appeal on May 30, 1990, Appendix F.

Plaintiff's lack of notice of the order, and the consequent denial of due

process of law, was raised orally in the trial court at the time the Defendant moved for release of the bond monies. Plaintiff likewise raised the notice issue in the Michigan Court of Appeals and Michigan Supreme Court.

ARGUMENT

THIS HONORABLE COURT SHOULD GRANT PLAINTIFFS' PETITION, WHERE THE ENFORCEMENT OF SANCTIONS AGAINST PLAINTIFF IS BASED ON HER VIOLATION OF AN ORDER WHICH SHE DID NOT HAVE NOTICE OF, AND THEREFORE CONSTITUTES A VIOLATION OF HER RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

It is well established in the law that one must have knowledge of an order before he or she can be held in contempt or otherwise punished for failing to comply with its terms. Wilson v North Carolina, 169 US 586, 600; 42 L Ed 865, 18 S.Ct. 435 (1897). Cross Co v UAW Local No 155, 377 Mich 202, 216; 139 NW2d 694 (1966). People v Matish, 384 Mich 568; 184 NW2d 915 (1971). The record contains nothing that shows plaintiff or her counsel knew that the trial court was being petitioned on an ex parte basis, or that any order was entered which purported to control

plaintiff's conduct. Plaintiff knew nothing of the order entered against her.

This Court has previously stated that, fundamental to our concept of liberty is the "notion that persons have a right to fair warning of that conduct which will give rise to... penalties..." Marks v United States, 430 US 188, 192, 51 L Ed 2d 260, 97 S Ct 990 (1977). To punish plaintiff by releasing those bond monies, for failing to comply with an order she did not know existed, violates this "fundamental concept of liberty," and likewise violated plaintiff's right to due process of law.

Plaintiffs' petition should be granted.

RELIEF REQUESTED

WHEREFORE, Plaintiff specifically requests that this Honorable Court will grant Plaintiff's petition, issue its Writ of Certiorari to the 53rd Judicial Circuit Court for the State of Michigan, and on final hearing reverse the trial court's order dated June 9, 1989, releasing bond monies to defendant.

Dated: August 20, 1990

Jerry L. Sumpter, J.D.
Sumpter & Perry, P.C.
Attorneys for Plaintiff
P.O. Box 286
Cheboygan, Michigan 49721
(616) 627-7167

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A. ORDER RELEASING BOND, 6/9/89
53rd Judicial Circuit Court
Cheboygan County, Michigan

B. EMERGENCY ORDER EXTENDING MEDICAL AUTHORIZATION, 4/10/85
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Cheboygan County, Michigan

C. ORDER, 7/1/86
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Cheboygan County, Michigan

D. ORDER, Denying Leave to Appeal
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E. ORDER, Denying Rehearing
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53rd Judicial Circuit Court
Cheboygan County, Michigan

STATE OF MICHIGAN
53RD JUDICIAL CIRCUIT COURT

DORA VALLANCE Plaintiff	)	
vs	)	File: 82-4842-NI Hon: Robert C. Livo
JAMES BREWBAKER	)	

ORDER RELEASING BOND

At a session of said court held in the City and County of Cheboygan, State of Michigan on May 15, 1989.

PRESENT: Hon. Robert C. Livo
Circuit Judge

Defendant Brewbaker moved to release the bond filed in this matter. The parties appeared and the Court heard argument. The Court decided to grant the motion for the reasons stated on the record.

IT IS ORDERED THAT:

1. Defendant's motion is granted and that $5,560.75 ($5489.75 originally awarded by this Court, plus $71.00 taxed by the Court of Appeals) the bond is

released to Defendant Brewbaker's attorneys, Bensinger, Combs & Cotant.

2. The remainder is released to Plaintiff's attorneys, Sumpter & Perry, P.C.,

Dated: June 9, 1989 /s/ Robert C. Livo
Circuit Judge

APPENDIX "A"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF CHEBOYGAN

DORA VALLANCE Plaintiff	)	File: 82-4842-NI
vs	)	Hon. Robert C. Livo
JAMES BREWBAKER	)	

EMERGENCY ORDER EXTENDING MEDICAL AUTHORIZATIONS

At a session of said Court held in the City of Cheboygan, County of Cheboygan and State of Michigan on the 10th day of April, 1985.

Present: Honorable Robert C. Livo
Circuit Judge

Defendant James L. Brewbaker, having moved for an emergency order to extend the dates of the authorization for release of medical information which was previously granted by this court, and the court being fully advised in the premises;

IT IS HEREBY ORDERED that the medical authorizations previously granted in this matter are hereby extended and

shall be valid until April 19, 1985 or until such time as trial in this matter is completed.

/s/ Robert C. Livo
Circuit Judge

APPENDIX "B"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF CHEBOYGAN

DORA VALLANCE Plaintiff	)	File: 82-4842-NI
vs JAMES BREWBAKER	)	

ORDER

At a session of said Court, held in the City of Cheboygan, County of Cheboygan, State of Michigan, this 1st day of July, 1986.

PRESENT: Hon. Robert C. Livo
Circuit Judge

The Court, having reviewed the petitions of Defendants Brewbaker and Kozial, having heard argument from both Plaintiff and Defendant, and having entered an Opinion as to the matter of allowing the taxation of costs and attorney fees herein;

THEREFORE, IT IS ORDERED AND ADJUDGED that Defendant Brewbaker is hereby granted the sum of $5,385.43 in attorney fees and taxable costs in the amount of

$104.32.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Kozial is granted the sum of $2,650.26 in attorney fees.

IT IS FURTHER ORDERED that these amounts are assessed against both Plaintiff, Dora Vallance, and her attorney, Jerry L. Sumpter, J.D.

/s/ Robert C. Livo
Circuit Judge

APPENDIX "C"

STATE OF MICHIGAN
COURT OF APPEALS

Dora Vallance	)	
	)	Docket: 118587
vs	)	L.C. 82-4842-NI
James Brewbaker	)	
	)	

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented. State ex rel Prosecuting Attorney for Ingham County v American Amusement Co., Inc, 71 Mich App 130 (1976); Plumbers & Pipefitters Local Union #190, v Wolff, 141 Mich App 815 (1985); Maness v Meyers, 419 US 449, 458-459; 95 S Ct 584; 42 L Ed 2d 574, 583 (1975); MCR 7.209(F)(1)(b).

[SEAL]

Dated: 9/11/89

/s/ Nobert G. Jaworski
Chief Clerk

APPENDIX "D"

STATE OF MICHIGAN
COURT OF APPEALS

Dora Vallance	)	
	)	Docket: 118587
vs	)	L.C. 82-4842-NI
James Brewbaker	)	
	)	

ORDER

The Court orders that the motion for rehearing is DENIED.

Dated: 11/8/89

/s/ Norbert G. Jaworski
Chief Clerk

APPENDIX "E"

STATE OF MICHIGAN
SUPREME COURT

Dora Vallance	)	SC: 87887
	)	COA: 118587
vs	)	L.C. 82-4842-NI
James Brewbaker	)	
_____	)	

ORDER

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Dated: 5/30/90
/s/ Corbin R. Davis
Clerk

APPENDIX "F"

A. ..only until April 8th, 1985. The anticipated date of the trial."

That's the authority that I had that there were no valid outstanding authorizations. I did not have an ex parte order, I did not have a motion, I did not have anything that even indicated that the Court had ordered that the prior authorizations that she signed under this order extended. I had nothing. I was sitting in my office trying to deal with this thing on the basis of a telephone call.

Q. Now, based upon your recollection, did the trial start on April 8th?

A. The trial started on April 8th.

We were before the Court, selected a jury, and then we were to continue the trial on either Thursday or Friday of that week. April 8th was a Monday. April 10th was a Wednesday when this decision occurred.

Q. And at the time of the phone conference, you had no order, ex parte order, or any order of any type or any motion of any type?

MR. GRIFFIN: Objection -- leading question your Honor.

THE COURT: I'll sustain it.

BY MR. HENKE:

Q. On April 10th, at the time of the telephone conference did you have in your possession any type of order that modified this January 22nd --

A. No -- nor did I know that one existed, as I recall. I didn't

know that. I knew that in order for the defense to obtain medical records from plaintiff, they were obligated, under this order here, 1/22/85, to provide my office with copies of the medical authorizations as issued. I do not have a medical authorization in my hand. I had not received one. None had been mailed to me, nor did I know that any existed. All I had was a phone call.

Q. Prior to April 10th, did defense counsel comply with this order and supply you with copies of authorizations as issued as per the Court's order?

A. No, they had not, not in any way.

Q. How about other particular authorizations?

A. Prior to March -- or prior to April 10th, they had fully

complied with the order by sending me a copy of the authorizations, dated, and the facility to whom the authorizations were directed. On the date of April 10th, they did not do that. They were merely running around the country handing authorizations that had been extended by an ex parte order without motion to all the health care facilities at that time, insist that those facilities give them a complete copy of the [end of page]

APPENDIX "G"

(2)

Supreme Court, U.S.
FILED
SEP 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-322

In The

Supreme Court of the United States

October Term, 1990

DORA VALLANCE,

Petitioner,

vs.

JAMES LIONEL BREWBAKER,

Respondent.

Brief In Opposition To Plaintiff's Petition For Writ Of Certiorari To The 53rd Judicial Circuit Court For The State Of Michigan

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I THAT THE PLAINTIFF'S PETITION SHOULD BE DENIED FOR THE REASON THAT THE CLAIMS OF ERROR REFERRED TO IN THE PETITION ARE NOT THE SUBJECT OF THE ORDER BEING APPEALED.

II THAT THE DISMISSAL OF THE PLAINTIFF'S ORIGINAL COMPLAINT WAS FULLY JUSTIFIED AS SHE REPEATEDLY REFUSED TO COMPLY WITH DISCOVERY ORDERS OF THE TRIAL COURT.

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RELEVANT MICHIGAN DISCOVERY RULES

MCR 2.119 MOTION PRACTICE

"**(C) Time for Service and Filing of Motions and Responses.**

(1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows: . . . "

MCR 2.301 COMPLETION DISCOVERY

"**(A)** Discovery must be completed 1 year after an answer has been filed unless the court sets another date by order

(1) on its own initiative, . . . "

MCR 2.313 FAILURE TO PROVIDE OR TO PERMIT DISCOVERY; SANCTIONS

"**(B) Failure to Comply With Order.** . . .

(2) *Sanctions by Court in Which Action Is Pending*. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following: . . .

(c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the

action or proceeding or a part of it, or rendering a judgment by default against the disobedient party; . . . "

MCR 2.314 DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY

(B) Privilege; Assertion; Waiver; Effects.

(1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response under MCR 2.310. A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

(2) Unless the court orders otherwise, if a party asserts that the medical information if subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

(C) Response by Party to Request for Medical Information.

(1) The party who is served with a request for production of medical information under MCR 2.310 must either:

(a) make the information available for inspection and copying as requested;

(b) assert that the information is privileged;

(c) object to the request as permitted by MCR 2.310(B)(2);

or

(d) furnish the requesting party with signed authorizations in the form approved by the state court administer sufficient in number to enable the requesting party to obtain the information requested from persons, institutions, hospitals, and other custodians in actual possession of the information requested . . . "

COUNTER STATEMENT OF FACTS & PROCEEDINGS

On March 3, 1982, the Plaintiff, Dora Vallance, was a passenger in an automobile driven by Stanley Kozial. The automobile was slightly damaged in a collision with a truck driven by the Defendant, James Brewbaker. On August 16, 1982, the Plaintiff filed this lawsuit in the Cheboygan County Circuit Court, Docket No. 82-4842-NI alleging that she had been injured. Throughout the subsequent course of this case, Plaintiff's counsel deliberately adopted a strategy of blocking defense attempts at discovery. In particular, the Defendant's attempts to obtain all relevant information concerning the Plaintiff's medical history were repeatedly thwarted by Plaintiff's counsel in spite of orders issued by the trial court. The trial court's written opinion details that history (See Exhibit A)

On January 22, 1985, the trial court entered an order requiring the Plaintiff to issue medical authorizations which would be valid through April 8, 1985, the anticipated date of trial. The Defendant was also granted the

right to thereafter "renew the authorization to a later specific date in the event that the trial is continued in this matter". (See Exhibit B)

Jury selection in this matter did occur on April 8, 1985, but further proceedings were postponed by the court until April 12, 1985. The final discovery order of which Plaintiff complains is attached as Exhibit C, the "Emergency Order Extending Medical Authorizations" obtained and filed by the Defendant on April 10, 1985. This emergency order renewed the previous order of January 22, 1985 regarding medical authorizations to April 19, 1985, the anticipated date for the completion of trial. The emergency order therefore did not increase the scope of the previously ordered authorizations, but merely extended the authorizations up to the anticipated date of the completion of trial, which had been the intent of the original January 22, 1985 order from the outset.

After obtaining the April 10, 1985 emergency order extending medical authorizations, defense counsel attempted to obtain Plaintiff's medical records from Dr. Gantz, Dr. Zimmerman and Cheboygan Memorial Hospital. All of these health care providers refused to turn over the Plaintiff's medical records in spite of being in possession of a valid medical authorization to release those records. Plaintiff's counsel had apparently secretly sent correspondence to the involved health care providers telling them that they were free to ignore the trial courts order to release the medical records. (See Exhibit D, Plaintiff counsel's testimony at evidentiary hearing on May 5, 1986) When Plaintiff's counsel was contacted by personnel at Cheboygan Community Hospital, on April 10, 1985 he apparently went so far as to revoke the

authorizations ordered by the court without seeking approval for that action by the Defendant or by the trial court.

On April 12, 1985, the Defendant moved to dismiss the Plaintiff's complaint for non compliance with the trial court's discovery orders. In an order entered May 6, 1985, the trial court dismissed the Plaintiff's complaint without prejudice for the reasons stated on the record at the motion hearing of April 12, 1985. In its written order the court stated:

> "It is hereby ordered and adjudged that Defendants motion to dismiss Plaintiff, Dora Vallance's case, only as to both Defendants, James Brewbaker and Stanley Kozial, be and is hereby granted for the reason stated on the record on April 12, 1985, said dismissal to be without prejudice.
>
> It is further ordered and adjudged that Plaintiff may file a new complaint against these Defendants, if she so elects, and the Defendants shall not have available to them the defense of statute of limitations if said lawsuit is filed within the next six months." (See Exhibit E)

In accordance with the order of dismissal, the Plaintiff re-filed her lawsuit four days later on May 10, 1985. That complaint was assigned Cheboygan County Circuit Court Docket No. 85-5595-NI which is referred to herein as the second lawsuit. That second lawsuit ultimately went to trial in March and April of 1986, and the jury returned a verdict of no-cause of action. The Plaintiff failed to file an application for leave to appeal to the Michigan Court of Appeals concerning the May 6, 1985 order dismissing the first case until September 19, 1986.

In an opinion dated March 25, 1987 (No. 95-413), the Court of Appeals ruled:

> "In these causes a late application for leave to appeal is filed by plaintiff-appellant, and an answer in opposition thereto, together motions for attorney fees having been filed by defendants-appellees, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the court,
>
> It is ordered that the late application for leave to appeal be, and the same is hereby denied for lack of merit in the grounds presented, but without prejudice to the issues that may be raised in No. 93856, and,
>
> It is further ordered that the motion for attorney fees be, and the same is hereby denied." (See Exhibit F)

After the first lawsuit was dismissed on May 6, 1985, the Defendant moved for costs and attorney fees on the same basis as the motion to dismiss. The trial court heard argument on the motion for costs, made pursuant to MCR 2.313(B), on July 22, 1985. In granting the motion, the court stated:

> "Let me just say that I find no substantial justification for non-compliance with the courts rule . . .
>
> The day when somebody can take an order from a Court and just ignore it or contradict it I think is the day that – if the day is here, then we're all in trouble. There is no reason to have a Court if you ignore a Court or the order of the Court." (See Exhibit G, motion transcript, 7/22/85 pages 11-12)

Subsequently the Plaintiff objected to the form of the order submitted as a result of the July 22, 1985 motion

hearing. A hearing was held on September 3, 1985 concerning the Plaintiff's objection; the court took the matter under advisement. Finally, an evidentiary hearing was held over two days on April 28, and May 5, 1986. The evidentiary hearing elicited testimony from the attorneys to establish the amount and reasonableness of attorney fees to be awarded as a result of the court's decision to grant the motion on July 22, 1985. The court heard the testimony of defense attorneys, Richard A. Griffen and Michael D. Combs, and Plaintiff's attorney Jerry Sumpter. At the conclusion of the evidentiary hearing, the court took the matter under advisement and subsequently issued an order and opinion which was entered on July 1, 1986. In that order, the court stated in part:

> "Therefore, it is ordered and adjudged that Defendant Brewbaker is hereby granted the sum of $5,385.43 in attorney fees and taxable costs in the amount of $104.32.
>
> It is further ordered and adjudged that Defendant Kozial is granted the sum of $2,650.26 in attorney fees.
>
> It is further ordered that these amounts are assessed against both plaintiff Dora Vallance, and her attorney Jerry L. Sumpter, J.D." (See Exhibit H)

On January 12, 1987 the Plaintiff filed her brief on appeal to the Michigan Court of Appeals concerning the trial court's order of July 1, 1986 awarding costs and attorney fees. In an opinion dated March 3, 1988, (No. 93856) the Michigan Court of Appeals ruled that:

> "Plaintiff and her attorney revoked the authorization to release medical records after the new court rules took effect. Application of MCR

> 2.313 was both feasible and just . . . The trial court properly required Plaintiff and her attorney to pay Defendant's reasonable expenses, including attorney fees, caused by the failure to obey a discovery order.
>
> We will not address the other issues raised in Plaintiff's brief on appeal because they already have been decided by order of a different panel of this court." (See Exhibit I)

The "other issues" mentioned refers to Court of Appeals' opinion (No. 95413) which upheld the basic dismissal of Plaintiff's first complaint. Subsequently, the Michigan Supreme Court denied the Plaintiff's application for leave to appeal concerning the costs and attorney fee issue (Case No. 82870) on October 31, 1988, (See Exhibit J) and Plaintiff's motion for reconsideration on February 1, 1989.

On June 12, 1989, the trial court ordered that the bond securing the $5,560.75 award of costs and attorney fees be released to the Defendant. (See Exhibit K) The Plaintiff filed her application for leave to appeal the release of bond to the Michigan Court of Appeals on June 27, 1989. The Application for Leave to Appeal was denied by the Michigan Court of Appeals (Case No. 118587) in an order dated September 11, 1989. (See Exhibit L) The Plaintiff subsequently filed application for leave to appeal the release of the bond to the Michigan Supreme Court on November 29, 1989. However, due to the fact that the Plaintiff's Application for Leave to Appeal had no merit, and because it was filed late, the Michigan Supreme Court denied the Application for Leave to Appeal (Case No. 87887) in an order dated May 30, 1990. (See Exhibit M)

On May 10, 1985 the Plaintiff filed yet a third complaint alleging abuse of process on the part of the Defendant relating to the obtaining of the order regarding authorizations. (Cheboygan County Circuit, Docket No. 85-5758-CZ) In an order dated October 15, 1985, Judge Ulrich, acting as Circuit Court Judge by assignment, dismissed the Plaintiff's complaint. The Plaintiff appealed the dismissal of this complaint, but in an order dated July 20, 1987 (Case Nos. 88107, 89023) the Court of Appeals upheld the dismissal of the abuse of process complaint. The order of the Court of Appeals was subsequently upheld by the Michigan State Supreme Court (Case Nos. 82049, 82050) in an order dated May 31, 1988.

Due to the Plaintiff's dissatisfaction with Judge Ulrich's dismissal of the abuse of process case, she filed a motion to disqualify Judge Ulrich. In an opinion dated August 5, 1988, Judge Davis sitting by assignment in the Cheboygan County Circuit Court denied the Plaintiff's motion to disqualify Judge Ulrich. The Plaintiff subsequently appealed Judge Davis's order to the Michigan Court of Appeals (Case No. 113291) but in an order dated March 14, 1989, the court denied the Application for Leave to Appeal. Subsequently, the Michigan Supreme Court (Case No. 85831) also denied Application for Leave to Appeal concerning the disqualification of Judge Ulrich.

This extensive description of the procedural history of this case was necessary to explain precisely which order of the trial court the Plaintiff is appealing to the United States Supreme Court.

SUMMARY OF ARGUMENT

The Plaintiff's Petition for Writ of Certiorari is based on a claim that the trial court improperly dismissed her complaint after issuing an invalid ex parte order regarding medical authorizations. The May 6, 1985 order dismissing the Plaintiff's complaint and the July 1, 1986 order awarding costs to the Defendant relating to the dismissal of that complaint have not been appealed to this court; instead the Plaintiff has only appealed the June 9, 1989 order of the trial court releasing a bond posted by the Plaintiff regarding the sanctions awarded by the trial court. In view of the Plaintiff's failure to appeal the May 6, 1985 and July 1, 1986 orders, the issues considered in those orders should not be considered by this court.

The order dismissing the Plaintiff's complaint and the subsequent orders for sanctions and release of bond were the result of the Plaintiff's repeated failures to honor discovery requests by the Defendant and orders compelling the Plaintiff to respond to those discovery requests. That being the case, the original dismissal was proper under any circumstances and the Plaintiff's Petition for Writ of Certiorari should be denied.

ARGUMENT

I

THAT THE PLAINTIFF'S PETITION SHOULD BE DENIED FOR THE REASON THAT THE CLAIMS OF ERROR REFERRED TO IN THE PETITION ARE NOT THE SUBJECT OF THE ORDER BEING APPEALED.

Pursuant to the terms of 28 U S C § 2101(C), a party has ninety days to file a petition for Writ of Certiorari to

the United States Supreme Court with regard to adverse decisions by a state court. The time for appealing both the April 12, 1985 order dismissing the original complaint and the July 1, 1986 order regarding the awarding of costs and attorney fees to the Defendant has therefore long since passed. Therefore, the only action of the trial court which could be appealed to the United States Supreme Court was the June 9, 1989 order releasing bond, concerning which an application for leave to appeal was denied by the Michigan State Supreme Court on May 30, 1990.

This is the second time that the Plaintiff has waived her right to appeal the validity of the dismissal of the original complaint. The Michigan Court of Appeals originally refused to consider an appeal of the order dismissing the first complaint due to the fact that the application for leave to appeal was not filed until September 19, 1986, approximately seventeen months after the original order of dismissal was first entered.

In appealing the June 9, 1989 order releasing bond, the Plaintiff should be limited to arguments concerning whether the mechanical procedures with regard to releasing the bond were complied with by the opposing parties in the trial court. All issues concerning the propriety of the dismissal of the original complaint and the sanctions subsequently awarded by the trial court were the subjects of orders and appeals other than those involved in this petition for a Writ of Certiorari. Since the Plaintiff's petition relates exclusively to the validity of the dismissal and the awarding of sanctions, it is irrelevant to the order being appealed from, and the petition for Writ of Certiorari should be denied for that reason.

II

THAT THE DISMISSAL OF THE PLAINTIFF'S ORIGINAL COMPLAINT WAS FULLY JUSTIFIED UNDER THE CIRCUMSTANCES OF THIS CASE

MCR 2.314(C)(1) gives a trial court authority to order that a Plaintiff produce medical authorizations in order to obtain her medical records. In the event a party fails to issue medical authorizations in response to a court order to do so, MCR 2.313(B)(2) gives the court authority to dismiss the cause of action and to award reasonable expenses including attorney fees associated with the dismissal.

According to the case of *Chandler v Florida* 101 S Ct 802, 449 U S 560, 66 L Ed 2d 740 the United States Supreme Court has no supervisory jurisdiction over a state court and in reviewing a state court judgment it is confined to evaluating it in relation to the federal constitution. In the case of *Maness v Meyers*, 419 U S 449, 458, 459; 95 S Ct 584; 42 L Ed 2d 574, 583 (1975) this court ruled that even when a party believes that a court order is invalid on federal constitutional grounds, that order must be obeyed or the party must risk being held in contempt by the trial court.

In Michigan a trial courts decision to award expenses is discretionary and is reviewed only as an abuse of discretion. *Johnson v Patmon, Young & Kirk*, P.C., 119 Mich App 362, 368; 326 NW2d 511 (1982), *Kurczewski v State Highway Commission*, 112 Mich App 544, 549-550; 316 NW2d 484 (1982), *Jacks Factory Outlet v Pontiac State Bank*, 95 Mich App 174, 178; 290 NW2d 114 (1980).

Pursuant to MCR 2.314 the trial judge had authority to issue the January 22, 1985 order (See Exhibit B) requiring the Plaintiff to provide the Defendant with medical authorizations. The January 22, 1985 order expressly reserved the right to the Defendant to "renew the authorization to a later specific date in the event that the trial is continued in this matter." In addition, MCR 2.301(A), authorizes the extension of discovery by the court "on its own initiative" under certain circumstances. In this situation, where Plaintiff's counsel had deliberately obstructed the Defendant's discovery, had ignored previous orders of the court, had caused the postponement of prior trial dates and had informed treating physicians that they could ignore authorizations mandated by the court a hearing was not necessarily required to extend the authorizations. The extension of discovery was within the discretion of the court and could be accomplished ex parte, if necessary.

The Michigan Court Rules recognize that on certain occasions motions may be heard by the court ex parte. MCR 2.119(C)(1) states in pertinent part as follows:

> "Unless a different period is set by these rules or by the court for good cause, a written motion *(other than one that may be heard ex parte)* notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows . . . "

Plaintiff's complaints about the nature of the order ring hollow in view of the fact that Plaintiff did not make this objection to the trial court during the hearing on April 12, 1985. In fact, Plaintiff's counsel expressly stated

that he had no complaint about the ex parte order. Mr. Sumpter said:

> "I also want to add that the Defendant – I haven't complained. Defendants come running in here for ex parte orders. I got ex parte orders the last two or three days that I couldn't believe. And I'm not in here complaining about that . . . " (See Exhibit N, page 21)

On these facts, it is clear that the dismissal of the Plaintiff's complaint was not only allowed but almost demanded under the Michigan General Court Rules. The dismissal of the Plaintiff's complaint was not based merely on his ignoring of the ex parte order of April 10, 1985, but also on the Plaintiff's deliberate obstruction of the Defendant's discovery and disregard of previous orders entered by the trial court in this case.

RELIEF REQUESTED

Wherefore, the Plaintiff requests that this honorable court deny the Plaintiff's petition and award double costs pursuant to Rule 50 of the Rules of the Supreme Court of the United States to the Defendant.

Respectfully submitted,

Counsel for Respondent:

JAMES C. COTANT
Attorney for James Brewbaker
308 West Main Street,
P.O. Box 1000
Gaylord, Michigan 49735
(517) 732-7536

APPENDICES TO THE BRIEF

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B. ORDER, January 22, 1985, 53rd Judicial Circuit Court, Cheboygan County, Michigan..... App. 9

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D. TRANSCRIPT, May 5, 1986, pp. 23-28, Evidentiary Hearing, 53rd Judicial Circuit Court, Cheboygan, Michigan.....App. 14

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EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF CHEBOYGAN

DORA VALLANCE,

Plaintiff,

vs.

JAMES LIONEL BREWBAKER
and STANLEY KOZIAL,
jointly and severally,

Defendant,

File No. 82-4842 MI

_____/

OPINION

Summary of Facts

This cause of action was commenced on August 16, 1982, by Plaintiff's complaint for injuries sustained in an automobile accident. In November, 1982, Defendant Brewbaker moved to have Plaintiff produce medical records and such records were ordered disclosed within 30 days. In May of 1983, the Court was advised by defendant that plaintiff had still not produced said medical records. In August, 1983, defendant again moved for production of those materials. After review by the Court, and subsequent hearings on the same matter, the Court ordered plaintiff to either produce the records or assert the patient/physician privilege and preclude presentation of medical proofs at trial.

Trial was adjourned from October 31, 1983, in part due to the absence of medical records. In January, 1984, Defendant Brewbaker moved for consolidation of this

cause with File No. 83-5135, that being *Kozial vs. Brewbaker*. The Court entered an opinion that these cases should be consolidated and the order was entered. Trial had been scheduled for April 8, 1984, and therefore was once again adjourned. A pretrial conference was held on June 11, 1984.

Several motions and hearings were held on Brewbaker's motions for summary judgment but this Court ruled that Plaintiff's Kozial and Vallance had met the initial threshold injury requirements. In January, 1985, Plaintiff Vallance was ordered to produce medical authorizations within seven (7) days. Trial was scheduled for April 8, 1985. Plaintiff moved for relief from all orders having to do with requiring plaintiff to release medical information, but this was denied.

On April 8, 1985, trial commenced with jury selection. There were several motions heard before recessing trial to April 12, 1985, and the Court ordered plaintiff to produce all medical information to defendants within 24 hours. When trial resumed on April 12, 1985, Defendant Brewbaker moved for dismissal of the case as plaintiff had failed to comply with the order to produce medical records. This motion was granted, the Court finding Plaintiff's non-disclosure prejudiced Defendants. On May 6, 1985 the Court entered a Judgment of dismissal without prejudice and allowing plaintiff to refile this suit. On May 22, 1985, Defendant Brewbaker moved for costs and attorney fees pursuant to MCR 2.313(B) and was joined by Defendant Kozial.

A hearing was held on July 22, 1985, on the issues of costs and attorney fees, at which time the Court orally

granted Defendant Brewbaker an award of $10,000.00 in attorney fees plus costs incurred and Defendant Kozial was allowed $7,500.00 in attorney fees plus costs to be recovered, this award being against both Plaintiff and her attorney. Defendant Kozial submitted an amended Bill of Costs on August 6, 1985 and a Settlement hearing was scheduled for September 3, 1985. At this hearing the Court took the motion under advisement as to the amount of costs and attorney fees and stated that it would consider the whole matter and whether to permit any additional costs. At this time, Defendant Kozial was requesting $6,872.50 in total attorney fees and $1,078.30 in expenses, and Defendant Brewbaker was requesting $116.32 in taxable costs and $16,156.29 in attorney fees.

Issues

The first issue before the Court is whether the allowance of costs and attorney fees to defendants was proper upon the dismissal of plaintiff's case. The Court, in making this decision, relied on MCR 2.313(B), which states in part:

> "(2) Sanctions by Court in Which Action is Pending If a party or an officer, director or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> " . . . (c) an order striking pleadings or parts of pleadings, staying further proceedings until the

> order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party."

The Court, in this instance, dismissed the plaintiff's suit as a sanction for failure to comply with its discovery orders. In doing so, the Court took into consideration the long history of this case, and the fact that the primary contention between the parties had been plaintiff's failure to produce medical information so as to allow defendants to adequately prepare their case. In the two and one-half years of ongoing litigation, plaintiff had not complied with the Court's orders to produce medical authorizations or medical records, and when authorizations were finally given, Plaintiff then revoked those authorizations at the last stage of the case. In the case of *Wood v. DAIIE*, 413 Mich 573 (1982), the Court stated at page 580:

> "The trial court in the instant case, after defendant ignored not only the time requirements of GCR 1963, 309, but also two orders compelling discovery, granted plaintiff's motion for a default judgment. This was a reasonable action which defendant no longer protests."

The Court in *Woods*, also noted:

> "The judicial system cannot tolerate litigants who flagrantly refuse to comply with the orders of the court and who refuse to make discovery, for [d]elay and evasion are added burdens on litigation, causing waste of judicial and legal time, are unfair to the litigants and offend the administration of justice.' " *Woods, supra*, quoting *Denton v. Swiss of Missouri, Inc.* 564 F2d 236, 241 (1977).

The Court may, in addition to dismissing the cause of plaintiff in this instance, cause to be paid the reasonable

expenses of the other party. See MCR 2.313(B)(2) which states:

> " . . . In lieu of or in addition to the foregoing orders, the court shall require the party failing to obey the order *or the attorney advising the party, or both* to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

This Court has concluded then, that an award for "reasonable expenses, including attorney fees" is justified under the circumstances cited here, to wit: Plaintiff and her attorney's long standing failure to comply with the court's order for discovery of medical information.

The second issue then becomes one of determining a fair award for defendants expenses. In interpreting what are to be construed as reasonable expenses, the Court notes that the court rule stipulates: " . . . reasonable expenses, including attorney fees, caused by the failure [to comply] . . . " The Court is bound to apply a standard of reason and to determine what expenses were caused by plaintiff's failure to comply. Certainly not every hour of legal time spent in defense of this cause was occasioned by plaintiff's failure to provide medical information, although a great deal of time and expense were caused by this failure. The Court has thus applied the standards outlined in *Crawley v. Schick*, 48 Mich App 728 (1973), those standards being:

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5)

> the expenses incurred; and (6) the nature and length of the professional relationship with the client."

The Court therefore finds and concludes as follows:

(a) That attorneys Combs and Griffin enjoy excellent professional standing and experience in the practice of law, particularly in the defense of liability cases.

(b) Although some skill was required in this matter, the effect of plaintiff's acts and omissions inhibiting discovery was primarily confined to loss of time and labor spent on repeated motions and orders to obtain those items without which defendants would be prejudiced.

(c) The amount in question is substantive to the extent that plaintiff claimed a large compensation ($100,000.00) for damages sustained.

(d) The case was not especially a difficult one initially, but was made more difficult because fair discovery was prevented by plaintiff and plaintiff's attorney.

(e) The expenses incurred were apparently about one-third higher than the normal expenses because of plaintiff's continuing course of denying defendants access to necessary medical information.

(f) The nature and length of the professional relationship with the clients was substantive for both attorneys Combs and Griffin.

Both defendants have submitted petitions to tax costs for the actual amount of attorney fees and costs incurred from the time of commencement of action in this suit. Although both defendants incurred considerable actual attorney fees and costs, this Court is not bound to award

defendants actual attorney fees but only "reasonable attorney fees" See *Johnston v. Detroit Hoist Co.*, 142 Mich App 597 (1985) and only those "reasonable expenses, including attorney fees, *which are caused by the failure . . .*" MCR 2.313(B)(2). Not all of defendants attorney fees and expenses can be attributed to plaintiff's failure to comply with court ordered discovery. The Court has reviewed the pleadings in this cause and has attempted to determine a fair basis for this award. After reviewing the entire file, (See the attached Abstract of Pleadings) the Court has determined that approximately one-third (1/3) of the pleadings (74 of 220 pleadings) in this case were related to the question of production of medical records or medical authorizations. It would follow then, that one-third (1/3) of defendants' expenses, including costs and attorney fees, were incurred solely by reason of Plaintiff's and Plaintiffs attorney's failure to make fair discovery or to obey the Court's orders for such discovery and by acting to obstruct discovery. Such acts and omissions were repetitive and not substantially justified, nor would an award of expenses be unjust under the circumstances of this case.

Therefore, Defendant Brewbaker having incurred attorney fees and expenses of $16,156.29, is allowed one-third of that amount, that being $5,385.43, together with taxable costs in the amount of $104.32.

Further, Defendant Kozial having incurred attorney fees and expenses in the amount of $7,950.80 is allowed one-third (1/3) of the amount, that being $2,650.26.

The Court further finds that Jerry L Sumpter, James Henke, Richard Smith and other attorneys all acted subject to the control of and for Jerry L. Sumpter to preclude discovery of medical information essential to the defense of the case at bar and without which the Defendant could not receive a fair trial on the merits. Even though the representation of Plaintiff was at times by multiple attorneys, because all were under the direction of attorney Jerry L. Sumpter, the Court finds it proper to assess the award made herein against Jerry L. Sumpter rather than against each individual attorney who acted on Plaintiff's behalf. Therefore, these amounts are assessed against both Plaintiff, Dora Vallance, and her attorney, Jerry L. Sumpter.

Dated: 7-1-86

/s/ Robert C. Livo
ROBERT C. LIVO,
Circuit Judge

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

DORA VALLANCE,

Plaintiff,

v

Case No. 82-4842-NI

JAMES LIONEL BREWBAKER and STANLEY KOZIAL, Jointly and Severally,

Defendants.

AND

STANLEY KOZIAL,

Plaintiff,

v

JAMES LIONEL BREWBAKER,

Defendant.

_____/

Jerry L. Sumpter P21164
Attorney for Plaintiff Vallance

Richard Allen Griffin P28064
Attorney for Defendant Kozial

Daniel Loznak P27294
Attorney for Plaintiff Kozial

Michael D. Combs P26929
Attorney for Defendant Brewbaker

_____/

ORDER
(Filed Jan. 22, 1985)

Defendant Stanley Kozial having moved for the production of medical authorization and the Court having benefit of oral argument in open court from counsel for both parties, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff shall execute within seven days of the receipt thereof an authorization for the release of medical information, said authorization to be prepared by the attorney for the defendant.

IT IS FURTHER ORDERED that said authorization for medical records shall apply to all information concerning plaintiff as to any and all medical care, treatment, or examinations which plaintiff has received, is receiving, or may receive in the future which is in any way related to the injuries which are the basis of this cause of action.

IT IS FURTHER ORDERED that the only exception to the above-referenced authorization shall be information that is the thought process of plaintiff's attorney, otherwise known as plaintiff's attorney's work product.

IT IS FURTHER ORDERED that any information obtained pursuant to said medical authorization shall be for the purpose of discovery and plaintiff shall retain the right to object to the admissibility of any evidence obtained thereby at trial.

IT IS FURTHER ORDERED that to prevent defendant from obtaining medical information beyond the date of trial, this authorization shall be valid only until April 8, 1985, the anticipated date of trial, but defendant shall

thereafter be allowed to renew the authorization to a later specific date in the event that the trial is continued in this matter.

IT IS FURTHER ORDERED that the above-referenced authorization shall be executed and returned to attorney for defendant within seven days after it is received by plaintiff's attorney. Copies of medical authorization must be sent plaintiff as issued.

Dated: 1-22-85

/s/ Robert C. Livo
Robert C. Livo,
Circuit Judge

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF CHEBOYGAN

DORA VALLANCE,

Plaintiff,

v.

JAMES LIONEL BREWBAKER, STANLEY KOZIAL, AND HARRY MORAN, JOINTLY AND SEVERALLY,

Defendants,

and

STANLEY KOZIAL,

Plaintiff,

v.

JAMES LIONEL BREWBAKER AND HARRY MORAN, JOINTLY AND SEVERALLY,

Defendant.

_____/

FILE NO.
82-4842 NI

HON.
ROBERT C. LIVO

BENSINGER, COMBS &
COTANT, P.C.
BY: MICHAEL D. COMBS (P26929)
Attorney for Defendant
308 West Main Street
P. O. Box 1000
Gaylord, Michigan 49735
PH: (517) 732-7536

JERRY L. SUMPTER (P21164)
Attorney for Plaintiff, Vallance

DANIEL LOZNAK (P27294)
Attorney for Plaintiff, Kozial

RICHARD A. GRIFFIN (P28064)
Attorney for Defendant, Kozial

JOHN D. HAYES (P14768)
Attorney for Defendant, Moran

_____/

EMERGENCY ORDER EXTENDING MEDICAL AUTHORIZATION

(Filed April 10, 1985)

At a session of said Court held in the City of Cheboygan, County of Cheboygan and State of Michigan on the 10th day of April, 1985.

PRESENT: HONORABLE ROBERT C. LIVO, CIRCUIT JUDGE

Defendant, James L. Brewbaker, having moved for an emergency order to extend the dates of the authorization for release of medical information which was previously granted by this court, and the court being fully advised in the premises;

IT IS HEREBY ORDERED that the medical authorizations previously granted in this matter are hereby extended and shall be valid until April 19, 1985 or until such time as trial in this matter is completed.

/s/ Robert C. Livo
HON. ROBERT C. LIVO
Circuit Judge

EXHIBIT D

* * *

Q Very good. You know, when I went to look at the medical records, tried to get medical records, I stopped by a couple of doctors' offices, and one of them was Dr. Gantz; and in his file, he said that he couldn't give medical records, not because a medical authorization had been revoked, but because you had sent him a letter, and he wouldn't give me a copy of that letter. And I want to direct your attention to that. He showed me the letter, and this was after this Court ordered that we were entitled to medical records. And there was a letter from you telling the doctor – And there was a number of doctors who got this letter. I recall seeing one in Dr. Zimmerman's file, by the way, telling the doctors that despite the fact this Honorable Court had ruled that we were entitled to medical records, that that doesn't matter, that it's up to the doctor and they can refuse to give the records if they want to. Do you recall that letter?

A I recall a letter explaining what I perceive is the legal situation.

Q And you told the doctors, did you not, that if they wanted to, despite this court's order, they could refuse to give the medical records; isn't that true?

A Whatever is in the letter, it says that.

Q Okay.

A that's part of the problem is because the doctors disclose information like that to you defense attorneys, and we have no protection. That's why I've objected all along to the carte blanche exposure of unqualified

releases to you fellows, because the doctors don't know the difference between –

Q Going back to my question, do you recall making that statement to the doctors in the letter that they did not have to give medical records?

A I don't recall that specific statement, but I know –

Q Do you recall the general statement?

A I recall the tenor of the letter was to explain to them what I perceived as the legal status of that particular situation.

Q Do you recall generally telling them that if they did not want to comply with the Court's order, that they did not have to?

A It was a year and a half ago or a year and a quarter ago when that was written. I don't know what specifically is in it. If you show me the letter, I am sure that I will affirm –

Q Believe me, I'd like to have gotten a copy, but you indicated in your letter not to share it with defense counsel.

A Well, you just indicated you got it in Dr. Zimmerman's file. It was in there. I mean, it was in every file you went and got, as I understand.

Q Do you recall saying generally to the doctors they need not give medical records? Do you recall that sir?

A I don't recall that. It may be in there, but I don't have a cement recollection of the letter I wrote.

Q Isn't it true that you were attempting, to the best of your ability, to prevent us from getting any records prior to 1982, the date of the accident?

A Absolutely not. That's the most grotesque, false statement.

Q That's not true?

A No.

Q Do you recall, when we were here last week, indicating to me that: Isn't it true, Mr. Combs, that if you were in my shoes, you would have tried to resist giving this information, too? Do you recall saying that to me?

A Yes.

Q Okay.

A Yeah. And probably if you were in my shoes, you would have tried to resist.

Q As you recall, Counsel, I answered under oath I would not. Now, isn't it true that you knew, prior to the automobile accident, prior to '82, that your client had had TMJ, prior back problems, prior neck problems? You were aware of that, weren't you?

A At what time?

Q You were aware of that back in April of '85, were you not?

A No.

Q You were not?

A No.

Q Okay.

A Not from the records.

Q When did you first become aware of that?

A When we got the records pursuant to your approach to the hospital is when I became aware of what was in the records.

Q Your client had never confided in you as to the prior problems?

A I did not know that those problems were going to show up. I had been advised by my client –

Q Were not going to show up. What do you mean by not show up?

A In the records.

Q We might not find them?

A No. I didn't know what was in there. Counsel, I did not know what was in those Cheboygan Hospital medical records prior to April of '82 any more than you did. I did not know other than what we had garnered from the client in the deposition. I did not know that.

Q And your client had never told you to the contrary?

A And the client had never told me. You know, you ask the general question: Have you had this type of problem or that type of problem, and I didn't look for them and neither did you. It didn't trigger enough in your, Mr. Griffin, or any other lawyer's mind – it didn't trigger enough in there to go out and subpoena those records beforehand, because it just hadn't dawned on us.

Q It certainly proved to be very important that those records were produced, wasn't it?

A Not for the 1985 trial that was dismissed, because she had not had any gynecological problems. Her D and Cs, her painful intercourse, was totally unrelated to the trial at that time. The back pain I associated with childbirth, which I understand occurs in every case. So I didn't see it as that dramatic.

Q Don't you agree that if this case would have gone to trial without the records of the prior TMJ, without the records of the prior neck problems, prior back problems, prior headaches, that the jury at that time would not have gotten a full picture of this lady's medical history? Don't you think they would have gotten a less than complete picture?

A I think the only advantage that you might have garnered is the fact that she had gone to Dr. Singer, which I did not know.

* * *

EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF CHEBOYGAN

DORA VALLANCE,

Plaintiff,

v

JAMES LIONEL BREWBAKER
and STANLEY KOZIAL,
jointly and severally,

Defendants.

_____/

CASE NO:
82-4842-NI
Honorable
Robert C. Livo

Michael D. Combs (P26929)
Attorney for Brewbaker
BENSINGER, COMBS &
COTANT, P. C.
308 W. Main St.,
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Gaylord, MI 49735
(517) 732-7536

Jerry L. Sumpter (P21164)
Attorney for Vallance

Richard A. Griffin (P28064)
Attorney for Defendant Kozial

_____/

JUDGMENT OF DISMISSAL

At a session of said Court held in the Courthouse, City of Cheboygan, County of Cheboygan, State of Michigan on the 6th day of May, 1985.

PRESENT: THE HONORABLE ROBERT C. LIVO, CIRCUIT JUDGE.

Defendant having moved to dismiss pursuant to MCR 1985, 2.313 based upon Plaintiff's violation of this Court's order compelling disclosure of medical information and this Court having heard testimony from Defendant's counsel, Michael D. Combs and from counsel for Community Memorial Hospital and Dr. Hergt, Jeffery Lyon, and having heard argument from respective counsel and being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' motion to dismiss Plaintiff, Dora Vallance's case only as to both Defendants, James Brewbaker and Stanley Kozial, be and is hereby GRANTED for the reasons stated on the record on April 12, 1985, said dismissal to be without prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff may file a new complaint against these Defendants, if she so elects, and the Defendants shall not have available to them the defense of statute of limitations if said lawsuit is filed within the next six (6) months.

/s/ _____

HONORABLE ROBERT C. LIVO
Circuit Judge

EXHIBIT F

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 23rd day of March in the year of our Lord one thousand nine hundred and eighty seven

DORA VALLANCE,

Plaintiff-Appellant,

-v-

JAMES LIONEL BREWBAKER and STANLEY KOZIAL,

Defendants-Appellees,

-and-

HARRY MORAN,

Defendant.

_____/

Present the Honorable Robert J. Danhof, C.J.

Presiding Judge

Michael J. Kelly
Walter P. Cynar
Judges

No. 95413
L.C. Nos.
82 4842 (1585) NI &
85 5757 NI

In these causes a late application for leave to appeal is filed by plaintiff-appellant, and an answer in opposition thereto, together with motions for attorney fees having been filed by defendants-Appellees, and an answer in opposition thereto having been filed, and due consideration thereof having had by the Court,

IT IS ORDERED that the late application for leave to appeal be, and the same is hereby DENIED for lack of merit in the grounds presented, but without prejudice to the issues that may be raised in No. 93856; and,

IT IS FURTHER ORDERED that the motion for attorney fees be, and the same is hereby DENIED.

STATE OF MICHIGAN – ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF,
I have hereunto set my hand
and affixed the seal of said
Court of Appeals at Lansing,
this 25th day of March in the
years of our Lord one thousand
nine hundred and eighty-seven

/s/ Ronald L. Dzierbicki
Chief Clerk

EXHIBIT G

* * *

Let me just say that I find no substantial justification for noncompliance with the Court's rule. I further find that the action is not still pending. It was terminated and dismissed by order of the Court, as I recall. And the refiled action is pending, yes, but that's not the same action. Mr. Sumpter was – The case was dismissed here because of noncompliance with the Court's order.

The day when somebody can take an order from a Court and just ignore it or contradict it I think is a day that – if the day is here, then we're all in trouble. There's no reason to have a Court if you ignore a Court or the order of the Court.

MR. GRIFFIN: May it please the Court. As a point of clarification, is the order against both plaintiff and Mr. Sumpter as authorized by the rule?

THE COURT: If that's what the rule authorizes, then that's what it is.

* * *

EXHIBIT H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF CHEBOYGAN

DORA VALLANCE,

Plaintiff,

File No.
82-4842 NI

vs.

JAMES LIONEL BREWBAKER,
and STANLEY KOZIAL, jointly
and severally,

Defendant,

_____/

ORDER

At a session of said Court, held in the City of Cheboygan, County of Cheboygan, State of Michigan, this 1st day of July, 1986.

PRESENT: HONORABLE ROBERT C. LIVO
Circuit Judge

The Court, having reviewed the petitions of Defendants Brewbaker and Kozial, having heard argument from both Plaintiff and Defendants, and having entered an Opinion as to the matter of allowing the taxation of costs and attorney fees herein;

THEREFORE, IT IS ORDERED AND AJDUGED [sic] that Defendant Brewbaker is hereby granted the sum of $5,385.43 in attorney fees and taxable costs in the amount of $104.32.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Kozial is granted the sum of $2,650.26 in attorney fees.

IT IS FURTHER ORDERED that these amounts are assessed against both Plaintiff, Dora Vallance, and her attorney, Jerry L. Sumpter, J.D.

/s/ Robert C. Livo
ROBERT C. LIVO,
Circuit Judge

EXHIBIT I

STATE OF MICHIGAN
COURT OF APPEALS

DORA VALLANCE, MAR 03 1988

Plaintiff-Appellant, No. 93856

-vs-

JAMES LIONEL BREWBAKER
and STANLEY KOZIAL,

Defendants-Appellees.
_____/

BEFORE: Cynar, P.J.; Beasley and K. B. Glaser,* JJ.

PER CURIAM

Plaintiff, Dora Vallance, appeals as of right a July 1, 1986 order granting the motion of defendants, James Lionel Brewbaker and Stanley Kozial, for costs and attorney fees against plaintiff and her attorney, Jerry L. Sumpter. The trial court granted the motion due to plaintiff's failure to provide discovery of her medical records.

On March 3, 1982, plaintiff, a passenger in a car driven by defendant Kozial, allegedly suffered injuries when defendant Brewbaker turned his truck into the path of Kozial's car as Kozial attempted to pass the truck. As a result of the collision, plaintiff filed suit against Brewbaker, who filed a third-party complaint against Kozial. The trial court consolidated the cases. Before trial,

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* Circuit Judge, sitting on Court of Appeals by assignment.

defendant Brewbaker repeatedly attempted to obtain certain of plaintiff's medical records. Plaintiff and her attorney resisted the attempts. For the continuing procedural history of the case, we borrow the language of a different panel of this court:

> "[T]he trial judge entered an order on January 22, 1985, that required plaintiff to execute authorizations for the release of medical records, which were to be valid through the April 8, 1985, anticipated trial date. The order further provided that 'defendant shall thereafter be allowed to renew the authorization to a later specific date in the event that the trial is continued in this matter.'
>
> "On April 10, 1985, the trial judge signed an ex parte order extending the time period for the releases. When defendants attempted to obtain additional medical records pursuant to the ex parte order, the attorney representing both Cheboygan Community Memorial Hospital and one of plaintiff's treating physicians contacted plaintiff and her attorney, who together revoked the authorizations.
>
> "On April 12, 1985, defendants Brewbaker and Kozial moved for dismissal on the ground that plaintiff failed to comply with the discovery order. The trial court found that plaintiff had violated the ex parte order by refusing to facilitate defendants' discovery efforts. Pursuant to MCR 2.314, the court required that plaintiff choose to either proceed to trial without adducing any medical evidence or allow her case to be dismissed without prejudice. Plaintiff chose the latter course."[1]

Both defendants filed motions to tax costs and attorney fees. The trial court determined that reasonable expenses, including attorney fees, should be assessed

against plaintiff and her attorney pursuant to MCR 2.313(B)(2) for plaintiff's continued failure to comply with discovery. The trial court concluded that approximately one-third of the expenses, including attorney fees, were attributable to plaintiff's failure to abide by the court's discovery orders. As a result, defendant Brewbaker was awarded $5,385.43 in attorney fees and $101.32 in costs. Defendant Kozial was awarded $2,650.26 in attorney fees.

On appeal, plaintiff claims that the trial court incorrectly applied the Michigan Court Rules of 1985 instead of the General Court Rules of 1963 to enforce compliance with its discovery orders. Plaintiff argues that the 1963 court rules did not contain provisions for sanctions against a party or an attorney for attorney fees. GCR 1963, 313.2(2), however, did provide that the court may make such orders in regard to refusal to comply with discovery orders "as are just". In *Jack's Factory Outlet v. Pontiac State Bank*,[2] this court affirmed a $1,000 sanction against plaintiff under GCR 1963, 313.2(2) for defendant's costs and attorney fees. The sanction resulted from plaintiff's willful refusal to make discovery.

MRE 2.313, which replaced GCR 1963, 313, specifically allows for sanctions of reasonable expenses, including attorney fees, against both parties and their attorneys for failure to comply with discovery orders. For purposes of this appeal, therefore, the relevant difference between the old and new court rules is that the new court rules allow for monetary sanctions against both party and attorney, while the old rules provided for sanctions against a party only. Having outlined the stakes, we now settle the question.

MCR 1.102 provides:

> "These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then prending. A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice."

Plaintiff argues that the trial court should have applied the old court rules because the instant suit was commenced under the 1963 rules and was dismissed only two months after the new rules took effect. We disagree.

Plaintiff and her attorney revoked the authorization to release medical records after the new court rules took effect. Application of MCR 2.313 was both feasible and just. The type of injustice that MCR 1.102 concerns itself with is that which is caused by a party's reliance on the prior rules.[3] Here, the change in the court rules did not work an injustice because parties should not hinder discovery regardless of whether they, their attorneys, or both may be subject to sanctions.

The trial court properly required plaintiff and her attorney to pay defendants' reasonable expenses, including attorney fees, caused by the failure to obey a discovery order.

We will not address the other issues raised in plaintiff's brief on appeal because they already have been decided by order of a different panel of this court.[4]

AFFIRMED. Costs and attorney fees to be taxed.

/s/ Walter P. Cynar
/s/ William R. Beasley
/s/ Kenneth B. Glaser, Jr.

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[1] *Vallance v. Brewbaker*, 161 Mich App 642, 644-645; 411 NW2d 808 (1987) (appeals from abuse of process claim filed by plaintiff).

[2] 95 Mich App 174; 290 NW2d 114 (1980).

[3] *Davis v. O'Brien*, 152 Mich App 495, 501; 393 NW2d 914 (1986).

[4] *Vallance v. Brewbaker*, Docket No. 95413, Order decided March 23, 1987.

EXHIBIT J

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associates Justices

ORDER
Entered:

October 31, 1988

82870

DORA VALLANCE,

Plaintiff-Appellant,

SC: 82870
CoA: 93856
LC: 82-4842-NI

v

JAMES LIONEL BREWBAKER,
and STANLEY KOZIAL,
Jointly and Severally,

Defendants-Appellees,

and

HARRY MORAN,

Defendant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Griffin, J., not participating.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

October 31, 1988 /s/ Corbin R. Davis
Clerk

EXHIBIT K

STATE OF MICHIGAN

53RD JUDICIAL CIRCUIT COURT

DORA VALLANCE, Plaintiff, vs JAMES LIONEL BREWBAKER and STANLEY KOZIAL, jointly and severally, Defendants.	)	File No. 82-4842-NI Hon. Robert C. Livo

Sumpter & Perry, P.C.
By: Thomas E. McDonald P39312
Attorney for Plaintiff – Vallance
P. O. Box 286
Cheboygan, Michigan 49721-0286
Phone: (616) 627-7167

MICHAEL D. COMBS (P26929)
Attorney for Defendant – Brewbaker
P. O. Box 1000
Gaylord, Michigan 49735
Phone: (517) 732-7536

A TRUE COPY
DATE 6-12-89
/s/ Roberta E. Bonnett, Jp
Clerk Register Cheboygan Co.

ORDER RELEASING BOND

At a session of said Court held in the City and County of Cheboygan, State of Michigan on May 15, 1989.

PRESENT: Honorable Robert C. Livo, Circuit Judge

Defendant Brewbaker moved to release the bond filed in this matter. The parties appeared and the Court heard argument. The Court decided to grant the motion for the reasons stated on the record.

IT IS ORDERED THAT:

1. Defendant's motion is granted and that $5,560.75 ($5,489.75 originally awarded by this Court, plus $71.00 taxes by the Court of Appeals) of the bond is released to Defendant Brewbaker's attorneys, Bensinger, Combs & Cotant.

2. The remainder is released to Plaintiff's attorneys, Sumpter & Perry, P.C.

Dated: June 9th, 1989

/s/ _____
Hon. Robert C. Livo, Circuit Judge

EXHIBIT L

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

Dora Vallance v James
Lionel Brewbaker

Docket # 118587

L.C. # 82-4842-NI

Marilyn Kelly
Presiding Judge
John H. Shepherd
Martin M. Doctoroff
Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented. *State ex rel Prosecuting Attorney for Ingham County v. American Amusement Co, Inc.*, 71 Mich App 130 (1976); *Plumbers & Pipefitters Local Union #190 v. Wolff*, 141 Mich App 815 (1985); *Maness v. Meyers*, 419 US 449, 458-459; 95 S Ct 584; 42 L Ed 2d 574, 583 (1975); MCR 7.209(F)(1)(b).

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on

SEAL

Sept. 11, 1989
Date

/s/ Norbert G. Jaworski
Chief Clerk

EXHIBIT M

Order
Entered: May 30, 1990

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justice

87887

DORA VALLANCE,

Plaintiff-Appellant,

v

JAMES LIONEL BREWBAKER,

Defendant-Appellee.

SC: 87887
COA: 118587
LC: 82-4842-NI

(Filed May 31, 1990)

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 30, 1990 /s/ Corbin R. Davis
Clerk

EXHIBIT N

* * *

I also want to add that the defendants – I haven't complained. Defendants come running in here for ex parte orders. I got ex parte orders the last two or three days that I couldn't believe. And I'm not in here complaining about that, although it was pretty disastrous for me to be out of town, also, myself and to be getting a bunch of ex parte orders. They've listed four expert witnesses, four dentists, that I don't even know about. I'm not here asking for a continuance or an adjournment so I can depose them. They've got their artillery.

* * *